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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

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MM Docket No. 87-268

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REPLY COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

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January 22, 1996

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SUMMARY

Broadcasters should make a specific, enforceable commitment to use the valuable ATV spectrum to provide free, over-the-air TV and to serve the public's needs, and the Commission should establish a date certain for the return of the analog spectrum.

For the most part, the broadcast industry's comments have been remarkable for what they *do not* say. Almost all responding broadcasters seek to evade competitive bidding or comparative licensing procedures in obtaining spectrum which has been valued as high as \$100 billion. However, they disclose little or nothing about their intentions for the use of this spectrum. In particular, most broadcasters - with the notable exception of public broadcasters - do not even entertain the notion that viewers should receive increased public service in exchange for this huge gift.

There is a serious flaw in this position. The only possible justification for giving broadcasters *exclusive* use of the *entire* 6 MHz of spectrum - aside from a firm commitment to deliver increased public service in return - is that they will deliver significant amounts of HDTV-format programming. But broadcasters offer only dreams, not promises. And they have not refuted the suggestion of MAP, *et al.* that an alternative regulatory structure, *i.e.* the "condominium option," will provide the American public with HDTV, enable current broadcasters to transition to digital, and increase the diversity of broadcast voices.

Another crucial element which is absent here is a commitment principally to use the 6 MHz allocation to provide free, over-the-air television. Indeed, broadcasters argue that they should only be required to provide one such service, with the rest of the 6 MHz allocation being used for "ancillary and supplemental" services. If the ancillary services are more lucrative, there may be little incentive to provide viewers with more than one free, SDTV-quality service.

Even though ATV may allow broadcasters to increase greatly their programming capacity, they seek to cap their service to the viewing public at current levels, and to fulfill these obligations on both the current NTSC channel and any "free" programming services provided on the ATV channel. This demonstrates once again that these broadcasters seek something for nothing. Instead, in exchange for use of this new spectrum, they should provide free time for political candidates, increased children's educational and informational programming, and capacity for noncommercial users. The public deserves no less.

Several broadcast commenters urge the Commission automatically to award ATV licenses to existing NTSC licensees based upon a presumption of their ability to generate capital and greater technical knowledge and experience. Not only are these factors precisely the determinations which are made at comparative hearings, but as a matter of law, the Commission may not presume that existing licensees are qualified. The broadcast industry's portrayal of this as a "loan" of spectrum is misleading and inapt, because at best an interest-free loan with no payback deadline is a revenue expenditure. What the industry seeks to accomplish here is really the creation of a whole new service.

Lastly, certain technical issues raise public interest considerations and ought to be addressed in this proceeding. For example, the Commission should adopt rules to ensure open architecture of set-top boxes. Open architecture is critical to ensure that every viewer has unfettered access to reach all free, over-the-air digital television programmers. The Commission must also adopt technical standards which would promote the interoperability of computers and digital television sets, encouraging the rapid adoption of ATV. Finally, a mandatory labeling requirement and phase-out date for NTSC set construction would promote greater consumer awareness and would in no way constrain manufacturers' freedom to design and to market sets.

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REPLY COMMENTS OF MAP, *et al.*

Media Access Project, the Center for Media Education, Consumer Federation of America, the Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters ("MAP, *et al.*") respectfully submit these reply comments in the above-referenced matter.

For the most part, the broadcast industry's comments as to their claim for the digital ATV allocation are most remarkable for what they *do not* say. Almost all responding broadcasters seek to evade competitive bidding or comparative licensing procedures in obtaining spectrum which has been valued as high as \$100 billion. However, they disclose little or nothing about their intentions for the use of this spectrum. In particular, most broadcasters - with the notable exception of public broadcasters - do not even entertain the notion that viewers should receive increased public service in exchange for this huge gift.¹

Such plans as these broadcaster commenters do disclose, however, are riddled with contra-

¹Public broadcasters have a proposal of their own. While MAP, *et al.* do not support this plan in its entirety, they feel that public broadcasting presents a special case which is entitled to special consideration. See discussion below at pages 22-23.

dictions. For example:

- Many broadcasters say they need a 6 Megahertz ("MHz") allocation of spectrum to provide High Definition Television ("HDTV").

BUT, they indicate that they may never actually broadcast HDTV programs.

- Many broadcasters say that this proceeding is a mere "reallocation" of spectrum.

BUT, they plan to offer a panoply of so-called "ancillary and supplementary" services² which have never before been a part of over-the-air television broadcasting.

- Many broadcasters say that if the Advanced Television ("ATV") spectrum is auctioned, cable, cellular and phone companies will outbid broadcasters and take spectrum space away from public use.³

BUT, they make no indication that these are not the identical types of services they would provide as "ancillary," nor that they would not contract with or sublet spectrum to these same companies for such services.

- Many broadcasters rely on their record of serving the public interest as a reason they should receive this new spectrum allocation.

BUT, they resist all proposals to create public interest obligations for new program services, specific enforceable programming commitments as to their existing service, and creation of additional enhanced public interest obligations.

- Many broadcasters profess to seek a short transition period for return of currently used analog spectrum.

BUT, their methods for determining when the transfer is to take place are riddled with loopholes, so that this period could extend for decades.

²The Commission inquires whether it should allow licensees to provide not only ancillary and supplementary services that are analogous to those permitted under the current NTSC regime, but also non-programming and subscription services that go beyond those currently permitted. *FNOPR* at ¶23. For the purposes of these reply comments, MAP, *et al.* will refer to all these contemplated services interchangeably as "ancillary services."

³NBC, Inc. President Robert Wright recently announced these concerns to a gathering of television critics. Telecom Fight in Congress is "Messy Deal," *Communications Daily*, January 19, 1996, at 5.

- They claim they need to convert to digital technology to "keep pace with other technologies."

BUT, in other public and private comments they claim that *they* will control the pace of conversion to digital,⁴ and even that after the conversion many programming technologies will *NOT* be digital.⁵

On the eve of this filing, it appears that the broadcast industry has finally realized that these inconsistencies have begun to erode their position, and that they are losing credibility with both public and key policymakers. See, e.g., William Safire, Stop the Giveaway, *New York Times*, January 4, 1996; *Communications Daily*, January 11, 1996, at 3. As a result, the National Association of Broadcasters ("NAB") decided to seek to purchase public opinion by mounting a huge public relations campaign to rally support for a free grant of the ATV spectrum, saying it will spend "whatever it takes." Broadcasters Launch Campaign For Support From Public, *Communications Daily*, January 18, 1996, at 3.

Sadly, the viewing public does not have well-paid PR specialists and lobbyists to ensure that their needs are not forgotten. But all the issue advertisements, station-manager editorials, and "eighth floor visits" in the world will not change the truth - grant of this spectrum to

⁴For example, Neil Braun, President of NBC Television Network, stated at the Commission's *En Banc* hearing on Digital Television on December 12, 1995, that "free over-the-air broadcasting will not be able to compete long term against wireline, wireless and satellite...unless it can deliver high definition television using a full six megahertz of spectrum." Testimony of Neil Braun, in MM Docket No. 87-268, at 2. Only minutes later, he contradicted himself, saying "[W]ithout free over-the-air television as a foundation for and marketplace driver of digital technology, consumers will take a lot longer to purchase digital equipment." *Id.* "Will consumers invest in digital television sets if they cannot get their favorite programs in high definition? Maybe, but it will take an awfully long time." *Id.* at 4.

⁵"During and even after the transition to digital, there will be a demand for NTSC sets driven by preexisting cable services, wireless cable services, direct broadcast satellite services and VCRs." Grand Alliance Comments at 17; Thompson Comments at 9.

broadcasters in the absence of added public service and/or financial obligations is a giveaway of the highest order.⁶

I. THE CONDOMINIUM OPTION WILL ALLOW FOR GREATER DIVERSITY AND MORE FREE, OVER-THE-AIR TELEVISION, BUT WILL NOT REDUCE THE AMOUNT OF HDTV PROGRAMMING THE PUBLIC RECEIVES.

Although the need for it is by no means established, many broadcasters claim that a free grant of 6 MHz of extra spectrum is the only way this country can enter the era of HDTV. Broadcasters' Comments on the Fourth Notice of Proposed Rulemaking at 7-9, 10-11 ("Broadcasters' Coalition Comments"); Comments of Association of America's Public Television Stations and the Public Broadcasting Service at 13 ("AAPTS Comments"). *See also* Testimony of Neil Braun, *supra* at 2, nn. 2, 3 (broadcasters need to provide HDTV to remain competitive and to drive sales of digital sets).

These are dreams, not promises. Few broadcasters make a definitive pledge actually to deliver a significant amount of HDTV programming. Far from committing to broadcast even one hour of HDTV, the industry argues that, as the market develops, it may find that HDTV is simply not needed or demanded. Therefore, it is said, the Commission should not impose any minima for the amount of HDTV service to be provided. Comments of the National Association of Broadcasters at 3 ("NAB Comments"); Broadcasters' Coalition Comments at 17-18; Comments

⁶The majority of these comments are directed to what actions the Commission should take if it decides to grant the 6 MHz of ATV spectrum to incumbent broadcasters. However, this is not to be taken as an endorsement of simply giving the broadcasters the spectrum. As MAP, *et al.* say in their comments, at pages 16-17, they would prefer that Congress resolve this debate by auctioning the spectrum and reserving a substantial percentage of the proceeds for "public service media" uses like school and library access to advanced telecommunications networks, public broadcasting, production of children's informational and educational programming, and minority media development programs.

of the Association of Independent Television Stations, Inc. at 10 ("INTV Comments").⁷

There is a serious flaw here. The only possible justification for giving broadcasters *exclusive* use of the *entire* 6 MHz of spectrum - aside from a firm commitment to deliver increased public service in return - is that they will deliver significant amounts of HDTV-format programming. Aside from the technical requirements necessary to provide HDTV, the broadcasters have shown no other sound basis for an exclusive 6 MHz grant.⁸ And they certainly have not refuted the suggestion of MAP, *et al.* that an alternative regulatory structure, *i.e.* the "condominium option," will provide the American public with HDTV, enable current broadcasters to transition to digital, and achieve the added benefit of promoting diversity of broadcast voices. See MAP, *et al.* Comments at 13-16; Comments of the Alliance For Community Media at 33 ("ACM Comments").⁹

⁷On this matter, they are in accord with the comments of MAP, *et al.* MAP, *et al.* Comments at 18.

⁸Broadcasters also argue that they deserve a 6 MHz grant of spectrum because of their history of service to the public. But the broadcasters have shown no reason why their public service cannot continue - and that broadcaster profits will not remain strong - if they are instead given sufficient capacity for one or two SDTV program services. Moreover, they wholly ignore MAP, *et al.*'s suggestion that a grant of extra spectrum requires a promise of extra public service. MAP, *et al.* Comments at 27-32.

⁹Importantly, the condominium options would increase access for minority programmers if grant of the spectrum was limited to incumbent broadcasters. For a discussion that ATV licensing offers an opportunity to make significant progress towards the Commission's longstanding goal of increasing minority programmer access, see Testimony of David Honig, Executive Director, Minority Media and Telecommunications Council, *En Banc* Hearing on Digital Television, at 2-4.

A. The Condominium Option Allows For The Provision Of HDTV And Is Compatible With The Grand Alliance System Because It Would Use 6 MHz Of Spectrum.

Several broadcast commenters argue that unless they receive the entire 6 MHz of spectrum, they will be unable to broadcast HDTV. Indeed, both the broadcasters' coalition and the Digital HDTV Grand Alliance ("Grand Alliance") agree that HDTV transmission requires the entire 6 MHz bandwidth. Broadcasters' Coalition Comments at 10-11 (Narrower allotment would "abandon" HDTV's "state of the art technology" and be "inferior to what the public was promised"); Comments of the Digital HDTV Grand Alliance at 2 ("Grand Alliance Comments"). MAP, *et al.* do not dispute this.

However, this fact alone does not justify allocating broadcasters the entire 6 MHz. Indeed, the unspoken truth about broadcasters' business plans is that *they will actually broadcast in HDTV format for only a small fraction of the day, if at all*. This is discussed more fully below at page 9.

Perhaps for this reason, the Grand Alliance has supported a concept remarkably similar to MAP, *et al.*'s condominium options.¹⁰ It has commented that if broadcasters choose not to offer HDTV, it would "make sense to retain the 6 MHz channelization scheme and to share the...digital bit stream available over such a channel among multiple providers." Grand Alliance Comments at 2. *See*, Comments of General Instruments Corporation at 9.

Second, nothing about MAP, *et al.*'s two condominium options would prevent development of HDTV services. This is because the plan remains faithful to a 6 MHz scheme. *Compare*

¹⁰The condominium concept has already been shown to be technologically consistent with the Grand Alliance standard. *See* MAP, *et al.* Comments at 10.

MAP, *et al.* Comments at 7-8, *with* Grand Alliance Comments at 2. Under the first condominium option, the Commission would allocate (by either hearing or auction) the 6 MHz intended for ATV, with existing broadcasters and eligible new programmers able to participate. MAP, *et al.* Comments at 7-8. If a new licensee obtains the spectrum, the existing broadcaster would have must carry rights on the new system. But the Commission could stipulate that these must carry rights include a time-sharing provision whereby both programmers get the entire 6 MHz to provide HDTV for specified amounts of time. *Id.*

Under the second condominium option, each existing broadcaster would get a 6 MHz allocation, but would lease part of it to one or more nonaffiliated programmers. MAP, *et al.* Comments at 8-9. If one programmer wishes to broadcast a program which it believes the public wishes to see in HDTV, it could obtain the additional necessary bandwidth, either through purchase or barter, from the other programmers sharing or leasing space on the same channel. A time-share program may be required by the Commission or a negotiated part of the lease agreement. Thus, broadcasters will be able to carry the amount of HDTV programming that they desire and that the market will bear.¹¹

Significantly, however, to the extent broadcasters do not plan to broadcast in HDTV format, *see* discussion below at pages 9-10, the condominium options prevent them from reaping

¹¹Such time sharing may actually result in *more* HDTV programming than would otherwise reach the public. A numerical example illustrates why. Suppose an ATV programmer perceives that, given its funding and perceived marketplace demand, it could risk 5 hours per week of HDTV programming. If three programmers with similar perceptions shared one ATV allotment with a time sharing arrangement to use the entire 6 MHz, each one could support 5 hours per week. The total time of HDTV programming broadcast would triple, and the public would be more likely to receive the "state of the art technology" that "the public was promised." Broadcasters' Coalition Comments at 11.

a windfall at the expense of taxpayers and viewers by being given the opportunity to operate multiple revenue-generating program services with no added public interest obligations. *See* discussion below at pages 12-13.

B. The Condominium Option Ensures That Broadcasters Will Be Able To Afford The Transition To Digital Broadcasting.

Several commenters have voiced concern that they would not have sufficient funds to upgrade their cameras and other equipment to digital. This is their professed justification for providing so-called "ancillary and supplementary" and subscription services. For example, the broadcasters' coalition noted that

[b]efore the conversion is complete, stations will have to finance equipment modifications and replacements from every camera to electronic newsgathering equipment, signal distribution and switching equipment, transmitters, and antennas....Stations will have to undertake this effort even though few broadcast engineers are trained in the digital environment, and few engineering or construction companies can claim expertise in building a digital broadcast system....These capital costs of the transition are estimated to run from ten to twenty million dollars per station (and where new towers and other infrastructure are needed, substantially more).

Broadcasters' Coalition Comments at 13. *See also*, AAPTS Comments at 9 (Public television stations will only be able to provide ATV if they find sufficient funds to "financ[e] the very costly transition. ").

The condominium option, however, would not create so great a financial burden as to threaten broadcasters' ability to provide digital ATV. Instead, fees from parties which lease space on the ATV spectrum may be comparable to the profit broadcasters would otherwise make from ancillary services.¹² These fees may be used to defray the cost of purchasing transmitter,

¹²Since the purpose of Title III of the Communications Act is to foster diversity, the Commission can and should prohibit price discrimination and other anti-competitive practices, and should ensure affordable access by setting lease rates that promote, and do not deter, access.

switching, and antenna equipment. Arrangements may even be possible whereby programmers sharing the ATV spectrum with current broadcasters become investment partners in this equipment.

II. THE BROADCASTERS' PLANS TO DELIVER MOSTLY ANCILLARY SERVICES ATTEST TO THE NEED FOR A REQUIREMENT THAT THE ATV SPECTRUM BE PRINCIPALLY USED FOR FREE, OVER-THE-AIR TELEVISION.

Various broadcast commenters expound upon their plans to provide ancillary services. For example, the broadcasters' coalition and INTV both assert that, so long as licensees provide one free program service, there should be *no other limit* to the bitstream capacity that they can use for ancillary services. Broadcasters' Coalition Comments at 23; INTV Comments at 13.

MAP, *et al.* have been widely criticized in the trade press for suggesting that many broadcasters, if given unrestrained power, would provide only one free, over-the-air, standard-definition program service, and that therefore they should only receive enough spectrum to provide such a service. The industry's comments in this docket, however, have clearly established the validity of MAP, *et al.*'s position. For example, INTV freely admits that "[n]ew free broadcast services on the ATV channel are unlikely to increase station revenues." INTV Comments at 13. Thus, broadcasters may have no incentive to provide them. Furthermore, they would have even less motivation to provide substantial amounts of free HDTV services, as these would consume their entire ATV channel and leave virtually no room for ancillary services.

If the Commission is to allocate the entire 6 MHz to existing broadcasters, however, these comments demonstrate the need for a requirement that the ATV channel be "principally used for"

This will avoid the problems that have plagued commercial cable leased access channels. MAP, *et al.* Comments at 8 n.7.

free broadcast television service, *i.e.* a fixed 75% portion of the ATV bitstream capacity. See MAP, *et al.* Comments at 19-20; Grand Alliance Comments at 5-6 ("Predominant use of the channel" should be for free over-the-air television); Comments of New World Television, Inc. ("New World Comments") (supporting full-time HDTV simulcast of the free NTSC signal).¹³ Any other decision would unduly enrich the broadcasters at the expense of the viewing public. See MAP, *et al.* Comments at 7, 20.¹⁴

III. AT A MATTER OF LAW AND POLICY, NEW ENTRANTS SHOULD BE ELIGIBLE FOR THE ATV SPECTRUM.

Several broadcaster commenters urge the Commission automatically to award ATV licenses to existing NTSC licensees. For example, New World Television urges that "public interest considerations," such as "service continuity" and the "need to encourage investment," require that ATV licenses be paired with NTSC licenses. New World Comments at 5. The broadcasters' coalition, similarly, claims that only existing broadcasters have the "know-how and experience" to "sustain the risks and invest the capital needed" for a successful transition. Broadcasters' Coalition Comments at 8. Furthermore, it declares that broadcasters have already "participated substantially" in the effort to develop ATV, in which "[c]onsiderable sums (in the

¹³In any event, broadcast licensees which provide ancillary and supplementary services, such as teletext, are legally required to comply with Title III obligations. *Telecommunications Research and Action Council v. FCC*, 801 F.2d 501, 514-15 (D.C. Cir 1986).

¹⁴Microsoft's assertion that the preservation of free, over-the-air broadcasting is "an out-moded policy goal" and that therefore, the "best use of the spectrum [should] be determined by the licensee," is an argument for Congress, not the Commission. Its call for *de facto* repeal of Title III evidences a complete ignorance of the importance of the American system broadcasting as the only free, universal source of news and information for the public. Microsoft Comments at 7. Moreover, this argument does not address why broadcasters should have an exclusive and free right to the spectrum if it is not used primarily for free, over-the-air service.

range of \$500 million)" have already been spent for technology development and testing. *Id.*

First and foremost, when broadcasters claim that only they can generate the capital and apply the technical knowledge and experience necessary to provide digital television, they are putting the cart before the horse. Financial qualifications, technical ability, and demonstrated public service record are precisely the factual determinations which are made at comparative hearings. The Commission cannot legally presume that only existing licensees are qualified,¹⁵ and must bear in mind that in no way do existing licensees have property rights in the spectrum they use. *See also*, Comments of the Alliance For Community Media at 17-19 ("ACM Comments"). Indeed, in the dynamic telecommunications marketplace, many other entities may be ready, willing, and financially able to outperform existing licensees.¹⁶

Moreover, these broadcaster commenters are mistaken in claiming that costs they have already incurred to develop ATV technology somehow entitle them to a favored claim for licenses. As is true with any other pending policymaking procedure or litigation, a party incurs

¹⁵As MAP, *et al.* note in their comments, ATV will be a fundamentally different service than analog broadcast television. MAP, *et al.* Comments at 11-12. Thompson Consumer Electronics agrees with this assertion, noting that new services may "go beyond traditional bounds" of television. Thompson Comments at 3. Therefore, the Commission is required by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) to hold comparative hearings for license allocation. *See also*, ACM Comments at 13, 19-25; General Instrument Comments at 7 ("[A]llowing existing broadcasters too much "flexible use"...raises the *Ashbacker* problem by changing the primary service provided rather than modifying existing licenses." (emphasis in original)).

¹⁶INTV takes the presumption of financial qualification to an absurd end by claiming that *even bankrupt licensees* should remain eligible for the big giveaway. INTV Comments at 8. MAP *et al.* does not disagree to the extent that INTV argues that licensees in reorganization - but still operating - should remain eligible for ATV licenses. However, where licensees are facing liquidation and cessation of operations, there are no public policy or other reasons for them to be eligible. The Commission should not enhance the value of soon-to-be liquidated assets by allocating spectrum which could go to a financially qualified applicant which is better able to provide service to the public.

costs at its own peril and with full knowledge that it bears the risk of an adverse outcome. Any investment they made in the technology itself has not been lost: opening the licensing procedure to comparative hearings or to auctions, perhaps with a "must-carry" requirement for incumbent broadcasters, will not prevent the successful deployment of ATV service. MAP, *et al.* Comments at 19.

Finally, it should not be forgotten that while the broadcast industry may have made substantial financial outlays in developing digital television, it was that industry - and not the Commission - which sought to change the rules in the middle of the game. In the initial stages of the Commission's ATV proceedings, it was universally assumed that all digital broadcasting would be in HDTV format. But soon afterwards, the majority of broadcasters began to argue that full time HDTV would not be economically viable, and unveiled the concept of "spectrum flexibility." Thus, broadcasters only have themselves to blame for the resistance of the public and policymakers to their new plans.

IV. THE COMMISSION MUST NOT ALLOW BROADCASTERS TO GIVE BACK NOTHING TO THE PUBLIC IN RETURN FOR THIS GIFT OF SPECTRUM.

Even though ATV will allow broadcasters to multiply their programming capacity as much as six times, several commenters seek to limit their service to the viewing public to no more than current levels. The broadcasters' coalition argues that only the existing level of obligations should attach, and that a licensee should be able to fulfill these obligations on both the NTSC channel and the broadcast programming provided on the ATV channel.¹⁷ Broadcasters' Coali-

¹⁷While MAP, *et al.* support the expansion of public interest obligations in return for the ATV spectrum and the concomitant ability to provide additional program services, we believe that broadcasters should have latitude in meeting some of these requirements, and that they should attach to the licensee and not the service. MAP, *et al.* Comments at 25. Thus, the Commission

tion Comments at 25. INTV agrees, stating that stations' public interest obligations could be satisfied by "overall programming performance across all free, broadcast services." INTV Comments at 17. This is true, moreover, even though broadcasters would be gifted with a total of 12 MHz of spectrum for a very long period of time, if not in perpetuity. See discussion below at pages 15-18.

These broadcaster comments demonstrate the true nature of this spectrum giveaway. Broadcasters will double their allotment of a scarce and valuable resource.¹⁸ They could increase the number of SDTV-quality program services from one to as many as seven.¹⁹ Yet they seek to avoid increasing by one iota their overall levels of children's programming, access for political candidates, or community programming.

As MAP, *et al.* demonstrate in their Comments, in exchange for use of this new spectrum, broadcasters should provide free time for political candidates, increased children's educational and informational programming, and capacity for noncommercial users. MAP, *et al.* Comments

might consider permitting broadcasters to consolidate their community programming duties and/or their children's television duties and to place them on one program service. *Id.* Such leeway would not be possible for a licensee's political broadcasting obligations, however.

¹⁸MAP has demonstrated in numerous other fora that the scarcity rationale enunciated in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), remains valid and controlling law and was reaffirmed by the Supreme Court's opinion in *Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994). See, e.g., MAP Comments, *Review of the Prime Time Access Rule*, MM Docket No. 94-123, at 20-27 (filed March 7, 1995). The Commission's General Counsel, William Kennard, has recently and explicitly endorsed this view. William Kennard and Jonathan Nuechterlein, *Heeding Congress' Call on Kids' TV*, Legal Times, January 8, 1996, at 29.

¹⁹It has been roughly estimated that a 6 MHz allotment would allow the broadcast of 6 program services with SDTV resolution, *i.e.* equal to the NTSC standard. The seventh program service would be analog and located on the current NTSC allotment. There has been some indication that future digital TV sets would have the capability to receive analog as well as digital signals. See, e.g., Grand Alliance Comments at 17.

at 27-32. The public deserves no less.²⁰

V. THE BROADCASTERS' PROPOSALS FOR THE TRANSITION TO DIGITAL SHOW THAT THEY DO NOT ENVISION A "LOAN," BUT A PERMANENT GIFT.

The broadcast commenters' characterization of the transition to digital television has been a wellspring of confusion over the true nature of this spectrum grab. They seek to obscure the issues before the public, the Commission, and other policymaking bodies by portraying the conversion as a "loan" of spectrum which will be of painlessly short duration and which in no way will enable them to unduly profit. This conception is wholly misguided. Instead, it is apparent that broadcasters will profit greatly from the use of the extra 6 MHz, and they already seek to prolong the transition period for decades.

A. The Metaphor That Portrays The Transition To ATV As A "Loan" Of Spectrum Is Inaccurate And Highly Misleading.

Several commenters have attempted to create a fiction that the grant of the additional 6 MHz of spectrum is merely a "loan." *See, e.g.*, Capital Cities/ABC Comments at 4; Testimony of Richard E. Wiley, Chairman, FCC Advisory Committee on Advanced TV Service, En Banc Hearing on Digital Television, in MM Docket No. 87-268, at 3 (December 12, 1995); Comments of James C. McKinney, Chairman, Advanced TV Systems Committee, at 1. This concept was also mentioned frequently at the Commission's *en banc* Hearing on Digital Television on December 12, 1995.

This is an attempt, however, to distort the true nature of the ATV transition. Although some broadcasters have characterized this additional spectrum as a "loan," their comments make

²⁰Moreover, given this seven-fold increase in programming capacity, it is difficult to see how additional requirements will prove much of a burden.

clear that they do not want to give back any "interest" in the sense of public interest obligations or spectrum fees. *An interest-free loan is tantamount to a gift.* As MAP has previously observed, an interest-free loan is scored by the Congressional Budget Office and the Office of Management and Budget as a revenue expenditure. Letter from Gigi B. Sohn, Deputy Director, Media Access Project, to Rachelle B. Chong, FCC Commissioner (December 14, 1995) (filed in MM Docket No. 87-268).

Since there will be an indefinite, and perhaps infinite, period before payback, this proposed dual allocation of spectrum in no way resembles a "loan." Although this is discussed more fully below, pages 15-18, it is important here to note the comments of one of the originators of the idea of "spectrum flexibility," Dr. John Abel, President and CEO of Datacast Partners, Inc. At the Commission's *en banc* hearing on digital television, he posited that the time elapsed before broadcasters actually returned this so-called loaned spectrum could be fifty years or longer, even as much as the lifetimes of everyone present. *See also* ACM Comments at 15 (grant of "temporary" spectrum would become a "Trojan horse containing a permanent gift" to broadcasters).

B. To Prevent The Creation Of Loopholes That Could Delay The Transition To ATV, The Commission Should Establish Both A Date Certain For Return Of The NTSC Spectrum And A Mechanism To Ensure Universal Access To Digital Television.

The broadcasters' coalition obstinately and outrageously opposes establishing *any* guidelines for return of the NTSC spectrum. While it pays lip service to setting the "soonest possible" giveback date which does not disenfranchise NTSC viewers, it dismisses any fixed target date as "folly." Broadcasters' Coalition Comments at 27. It similarly condemns deadlines based on market penetration as "highly speculative in the absence of market experience." *Id.*

The preferred solution it seeks would be for the Commission to defer until a later and unspecified time any decision on a giveback date. *Id.* at 28.

This "preferred" solution is no solution at all. The effect of the broadcasters' coalition argument is to ask for use of an additional 6 MHz channel *in perpetuity*. It not only opposes setting a date certain, but also opposes penetration benchmarks. In rebuffing a fixed giveback date, it denies that the Commission has expertise to observe the industry and to make short-term predictive judgments about fundamental matters such as market penetration.

Several commenters urge the Commission to set a date certain for return of the NTSC spectrum, but to revise this date periodically in accordance with its estimates of when a benchmark rate of market penetration would be reached. Thompson Consumer Electronics and the Grand Alliance, for example, advocate a target date of between ten and fifteen years, periodically adjusted according to the Commission's projections of when 80% of households will no longer rely solely on NTSC service. Grand Alliance Comments at 10; Thompson Comments at 6. *See also* Motorola Comments at 6.

In the event that the Commission adopts a date certain or benchmark approach, the broadcasters' coalition falls back on several suggestions for how to set that date. It urges that a penetration benchmark should be calculated based on the number of sets in use, not only the number of households with either an ATV set or converter box. *Id.* at 28. It says that transition dates should be set on a market-by-market basis to avoid penalizing licensees and viewers in low penetration areas. *Id.* It urges that when a market does reach the target penetration rate, the Commission should examine the remaining NTSC set constituency. *Id.* Presumably, for example, if some of the remaining NTSC set owners would face financial hardship in upgrading

to ATV, licensees should be allowed to continue using the transition channel.

The Commission should beware of suggestions such as these which create loopholes to extend the duration of the transition period by decades. For example, it will clearly take longer to achieve 80% *set* penetration than 80% *household* penetration. The goal of a transition period should be to prevent disenfranchisement of households which still rely on NTSC. There is simply not the same compelling policy interest to protect multiple-set households against obsolescence of their second, third, or tenth set. Furthermore, to make the giveback determination on a market-by-market basis, including an examination of the constituency of NTSC set-owners, would require the Commission to undergo an exhaustive, time consuming process of defining markets and conducting hearings.

The broadcasters' coalition's suggestions are a perfect example of why the Commission should set a date certain, and not rely on market penetration: the penetration benchmark system is highly susceptible to gaming. Also, to make an accurate determination would require enormous agency fact-finding resources. The only practical alternative to ensure return of the NTSC spectrum is to adopt a date certain, along with a mechanism to ensure universal access to digital TV. See MAP, *et al.* Comments at 33-35.²¹

Moreover, several broadcast commenters suggest that the deadline to complete construction of ATV transmission equipment and to commence operating ATV channels should be extended. They claim that this is especially necessary for stations in smaller markets which do not have

²¹Also indicative of the broadcast industry's intentions to retain the spectrum indefinitely is its resistance to suggestions that broadcasters help subsidize those members of the public who cannot afford digital converters or receivers. See, e.g., Edmund L. Andrews, Telecom Bill: Another Day, Another Rift, *New York Times*, December 30, 1995.

the same financial resources as their larger brethren. NAB Comments at 7-8; Broadcasters' Coalition Comments at 15. NAB argues that in *all but the top 10 markets*, stations should not be required to commence ATV operations for 9, or even 12, years after licensing.²² NAB Comments at 8. Finally, the broadcasters' coalition asks that waivers of these deadlines be granted "liberally." Broadcasters' Coalition Comments at 15.

These arguments should be read together with the broadcasters' arguments to stall the giveback of the NTSC spectrum; they both may be seen as delaying tactics. For example, in the NAB's plan, ATV transmissions might not commence for up to twelve years. *See* NAB Comments at 8. Thus, in those markets, the clock for a penetration benchmark system would not even begin to run for twelve years. Meanwhile, licensees could put their ATV spectrum to profitable, ancillary uses.

VI. TECHNICAL ISSUES

While the Commission's *FNOPR* indicates that some technical issues such as the elements of the ACATS standard will be covered in a future Notice, *FNOPR* at ¶19, some parties have nevertheless commented on these and other technical issues. MAP, *et al.* believe that some of these more technical issues are so tightly bound up in policy matters that the Commission may want to address them pursuant to this Notice.

A. The Commission Should Insist Upon Open Architecture For Set-top Boxes And Bias Free Navigational Software.

Most parties to this proceeding, including MAP, *et al.*, believe that a competitive

²²Specifically, NAB advocates extending the construction deadlines from 6 to 9 years in all but the 10 largest markets. NAB Comments at 8. For stations in the "smallest" markets, it advocates a further extension to 12 years. *Id.*

equipment market is essential to encourage rapid consumer adoption of digital TV. Accordingly, several parties urge the Commission to adopt rules which ensure that set-top boxes and navigational systems do not become a means for their designers to exert anticompetitive influence. For example, INTV asserts that "[o]pen architecture and bias-free navigational software are essential to the smooth and swift transition desired by broadcasters, the Commission, and the public." INTV Comments at 20-21. INTV and the broadcasters' coalition warn against allowing set-top boxes which block or limit access to channels or which place channels on the navigational system in such a way as to accord them different degrees of viewer accessibility. *Id.* at 21; Broadcasters' Coalition Comments at 38.

On the other hand, Edward Grebow, the President of TELE-TV Systems, urged the Commission not to take any steps to impose mandatory standards or other constraints on set top boxes. Oral Testimony of Edward Grebow, Commission's *en banc* Hearing on Digital Television, December 12, 1995.

MAP, *et al.* support INTV's views, and believe that the Commission should adopt rules to ensure open architecture of set-top boxes. Open architecture is critical to ensure that every viewer has unfettered access to reach all free, over-the-air digital television programmers. This will promote, or at least preserve, the diversity of programming and editorial voices, and will drive down equipment prices to the benefit of consumers.

B. The Commission Should Ensure That The ATV Standard It Adopts Is Computer Compatible.

Apple Computer, Inc. has observed that "the current ACATS standard is flawed,..." Apple Comments at 4, because it includes elements which are incompatible with the operation of computer equipment. It therefore urges the Commission to adopt a technical standard which

would permit the convergence of computing and entertainment technologies. *Id.* Specifically, it argues that the ATV standard should employ only "non-interlaced" transmission formats, *Id.*, a higher, 70 Hz display rate, *Id.* at 6, and "square pixels." *Id.* at 7. It also urges the adoption of a higher quality data transmission standard so that ATV signal transmissions would be readable by computers. *Id.* at 6; Microsoft Comments at 3-5.

The Commission should heed Apple's suggestion and adopt whatever modifications to the ACATS standard that are necessary to enable consumers to use televisions and computers interoperably. MAP, *et al.* can discern absolutely no public interest benefits from requiring consumers to purchase redundant equipment, but several reasons to encourage compatibility. For example, a common standard may lead to machines which perform both functions, which will encourage households to adopt ATV more rapidly, and will likely drive down prices for both machines. Moreover, if equipment can perform double duty, every classroom which buys a computer will also have instant access to the benefits of digital ATV.

Interoperability will also alleviate the concerns expressed by the broadcasters' coalition about reaching *sets* instead of *households*. See discussion above at pages 16-17. Moreover, despite the indications that conversion devices may be available, Apple Comments at 5, there is no indication of when this would be, how much they will cost, or how well they will work.

C. The Commission Should Create An Affirmative Duty For Broadcasters And Equipment Manufacturers To Educate The Public About NTSC Receiver Obsolescence.

Some commenters argue against any requirements or regulations which would govern the manufacture of digital and analog television sets. Specifically, the Grand Alliance and Thompson Consumer Electronics argue that the Commission should not set a date after which NTSC